

CANADA / JUDGMENT

Toor v. Dhillon

2020 BCCA 291

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 291 Toor v. Dhillon COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Toor v. Dhillon, 2020 BCCA 291 Date: 20201013 Docket: CA46056 Between: Gurcharan Singh Toor and Kulwant Kaur Toor Respondents (Plaintiffs) And Ranbir Kaur Dhillon and Jarnail Singh Dhillon Appellants (Defendants) Before: The Honourable Mr. Justice Abrioux (In Chambers) On an application to settle the terms of an Order of the Court of Appeal for British Columbia, dated May 13, 2020 (Toor v. Dhillon, 2020 BCCA 137, Vancouver Docket CA46056). Oral Reasons for Judgment Counsel for the Appellants (via teleconference): A. Randhawa Counsel for the Respondents (via teleconference): H.S. Nirwan Place and Date of Hearing: Vancouver, British Columbia October 7 and 8, 2020 Place and Date of Judgment: Vancouver, British Columbia October 13, 2020 Summary: In reasons indexed as 2020 BCCA 137, the Court of Appeal dismissed an appeal from an order granting specific performance of a purchase and sale of a residential property. The division hearing the appeal set a procedure for the determination of the new closing date whereby the respondents on appeal were entitled to unilaterally set a closing date within 90 days of the publication of the Court's reasons, with the possibility of varying the date by consent. The respondents failed to do so and apply for an order setting new closing and possession dates. Held: Application referred to the division on appeal. The application seeks to vary an order of a division, which is beyond the jurisdiction of a single justice in chambers. ABRIOUX J.A.:

Introduction

- [1] In reasons for judgment indexed at 2019 BCSC 481, the applicant purchasers (the "Toors") were successful at trial in an action in which they sought specific performance of a contract of purchase and sale of a residential property located in Surrey, British Columbia.
- [2] The defendant vendors (the "Dhillons") then appealed to this Court. In reasons for judgment indexed as 2020 BCCA 137, the appeal was dismissed.
- [3] The basis of this application lies in the final paragraphs of the appeal reasons where Justice Hunter stated:

- [88] I agree with the trial judge that the appropriate remedy is an order for specific performance of the Contract. That was the order made in both *Shaw Industries*, where the order enabled either party to set a new closing date, and *Basra* (at paras. 48-49) when a new date was set by the Court. To assist the parties, I will set a procedure now for the determination of the new closing date, as was done in *Guraya v. Kaila*, 2019 BCCA 367 at para. 55.

Disposition

- [89] I would dismiss the appeal and direct that the respondents are entitled to set a closing date for the Contract within 90 days of the publication of these reasons, provided they give the appellants at least three weeks' notice of the closing date. The parties may vary these dates by agreement.
- [4] An order in these terms was entered on July 30, 2020 (the "Order").
- [5] The Toors failed to set a closing date within the 90-day period provided for in the Order nor did the parties vary the dates by agreement.
- [6] The Toors now seek an order of a justice of the Court pursuant to s. 10(2)(a) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 [Act] to set October 12 and 13, 2020 as the new closing and possession dates. Positions of the Parties
- [7] The Toors take the position that what they seek is specifically provided for in s. 10(2)(a) of the Act, that is "an order incidental to the appeal or matter not involving a decision of the appeal on the merits."
- [8] The Dhillons submit that a single justice does not have the jurisdiction to make the order sought. They argue that the Toors are in fact seeking an order varying the Order. Accordingly, they say that the matter should be referred to a division of the Court.

Legal Framework

- [9] In *Wilson v. Canwest Publishing Inc./Publications Canwest Inc.*, 2019 BCCA 394, after the hearing of an appeal in 2018 but before the order was entered, Canwest applied for an order substituting Postmedia Network Inc. for Canwest.
- [10] The basis for the application was that Postmedia had purchased Canwest's assets in 2010 "and in some respects stands in the shoes of Canwest " (at para. 4). Canwest also sought an order settling the Court's order from the appeal.
- [11] Justice Hunter explained the jurisdictional issue this way at paras. 6-8:
- [6] The issue in this application is the nature of my jurisdiction as a single judge of the Court of Appeal.

- [7] I have no doubt that this Court has the jurisdiction to substitute one party for another. The Court, however, sits in a quorum of at least three judges: s. 13, Court of Appeal Act, R.S.B.C. 1996, c. 77. My jurisdiction as a single judge in chambers is not that of the Court but rather is circumscribed by the provisions of the Court of Appeal Act dealing with the jurisdiction of a single judge. There is no provision in the Court of Appeal Act conferring jurisdiction on a single judge of the Court to substitute one party for another in an appeal. Any jurisdictional basis would have to rely upon more general language in the Act. Here, the applicants rely on s. 10(2)(a) of the Act, which states that: 10 ...
- (2) In an appeal or other matter before the court, a justice may do one or more of the following:
- (a) make an order incidental to the appeal or matter not involving a decision of the appeal on the merits;
- [8] An order incidental to the appeal has been interpreted as meaning "an order that has a minor or subordinate role in relation to the outcome of the appeal": *Strata Plan 1229 v. Trivantor Investments International Ltd.* (1996), 24 B.C.L.R. (3d) 292 at para. 25 (C.A.). In my view, a simple change of name of a corporation would be such an order, as the entity would remain the same but with a different name. The circumstances at bar are somewhat more complicated. [Emphasis added.]
- [12] Justice Hunter concluded that since "there is sufficient doubt about my jurisdiction to substitute a party beyond the most obvious circumstances, the most prudent course is to refer the application to a division for a decision" (at para. 11).

Analysis

- [13] In this case, the Toors attempted to set a closing date by agreement within the 90-day timeframe stipulated by the division of the Court that heard the appeal. Based on my review of the record on this application they were, if anything, overly generous to the Dhillons in attempting to accommodate them. In part, they were mindful of the COVID-19 pandemic and the effect that may have on the property changing hands. The Dhillons, for a period of time, were unrepresented by counsel, and the least that can be said, in my view, is that they were uncooperative in attempting to agree on the closing date.
- [14] Yet, the fact remains that the Toors had the right to unilaterally set down the closing date by mid-August 2020 and did not do so.
- [15] For some reason, after the appeal and notwithstanding the Order, they attempted to have the trial judge decide what the new terms of the closing should be. On August 28, 2020, in light of the Order, he quite properly declined to do so.
- [16] That day, the Toors then unilaterally set down a closing date for October 1, 2020, which the Dhillons did not comply with essentially on the basis that it was outside of the timeframe specified in the Order and there had been no consent variation.

- [17] I have concluded that the relief sought on this application should be referred to the division of the Court that decided the appeal. I am not satisfied that I have the jurisdiction to grant the relief sought.
- [18] In my view, this is not an issue which is "minor or subordinate in relation to the outcome of the appeal" although I do recognize that the appeal from the trial judgment which granted specific performance was dismissed.
- [19] That is because the division which dismissed the appeal also set out a specific process to be followed for completion of the sale to occur. This "involve[d] a decision of the appeal on the merits" and is thus beyond the ambit of s. 10(2)(a) of the Act.
- [20] The Order, furthermore, does not specify what should occur if the 90-day timeframe was not complied with and the parties failed to reach an alternative closing date by agreement.
- [21] I have concluded that the Toors are in fact seeking to have the Order which was made by a division of the Court varied by a single justice and I do not have the jurisdiction to make that order. At the very least there is:
- [11] sufficient doubt about my jurisdiction such that the more prudent course is to refer the application to a division of the court [since] the Court itself should review the circumstances and decide if such an order is appropriate.

Disposition

- [22] The application is dismissed and the matter is referred to the division of the Court that heard the appeal. [Submissions from counsel re: costs]
- [23] ABRIOUX J.A.: The Toors submit that the costs of this application should also be referred to the division of the Court hearing the application. The Dhillons seek an order that the costs of the application be fixed and that they recover those costs.
- [24] For the reasons I have outlined, while the Toors failed to unilaterally set the closing date in accordance with the Order, the Dhillons bear significant responsibility for what transpired. They also remain in possession of the property well beyond the timeframe specified in the Order. Accordingly, there will be no order as to costs. "The Honourable Mr. Justice Abrioux"

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